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In The
Supreme Court of the United States

October Term, 1988

WAYNE ALFRED HENING,

Petitioner,

v.

GORDON AMBACH, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK AND THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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QUESTIONS PRESENTED

1. Whether a professional has substantive due process rights under the Fifth and Fourteenth Amendments that would require the state, prior to impairing his liberty and property interests in his career and reputation by a disciplinary penalty imposing several years of psychiatric surveillance, to show that he is psychologically impaired and a danger to the community?

2. Whether, before imposing a disciplinary penalty of psychiatric surveillance, the state is required by procedural due process to prove a professional's impairment and dangerousness by substantial evidence, including relevant expert opinion, and to hold a hearing at which, after appropriate and timely notice of the state's intention to find him impaired and dangerous, the professional has an opportunity to show that he is not psychologically impaired or a danger to the community?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

WAYNE ALFRED HENING, *Petitioner*

v.

GORDON AMBACH, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK AND THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

The petitioner Wayne Alfred Hening respectfully prays that a writ of certiorari issue to review the judgment of the New York Court of Appeals, entered in the above-entitled proceeding on December 17, 1987.

OPINIONS BELOW

The judgment of the New York Court of Appeals[1] is reported at 70 N.Y.2d 926, 524 N.Y.S.2d 433 and its order is reprinted in the Appendix below, page 1a The subsequent denial of leave to appeal was reported at 72 N.Y.2d 802, 530 N.Y.S. 2d 554 and is reprinted in the Appendix below, page 1a.

The memorandum decision of the New York Supreme Court, Appellate Division, Third Department, was reported at 132 A.D. 2d 783, 517 N.Y.S. 2d 331 and is reprinted in the Appendix below, page 2a.

JURISDICTION

On August 20, 1986, petitioner brought a special proceeding under New York CPLR Article 78 in the New York Supreme Court, Appellate Division, Third Department by authority of Education Law §6510-a(4), to review a determination of the New York Board of Regents and an order of the Commissioner of Education in Discipline Case 4146. The order of the Third Department dismissing his petition was filed and served on petitioner on July 20, 1987. Petitioner thereupon served and filed a notice of appeal on Constitutional grounds under CPLR §5601(b)(1) on August 18, 1987 and a jurisdictional statement on August 27, 1987. The Court of Appeals dismissed petitioner's appeal for want of a substantial constitutional question on December 17, 1987 and that court's order was served upon petitioner by mail on February 4, 1988. Petitioner presented a timely motion to the Court of Appeals for leave to

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1. Petitioner has sought for the writ to issue to the New York Court of Appeals rather than the Supreme Court, Appellate Division, Third Department, since the Court of Appeals dismissed petitioner's appeal on constitutional grounds under CPLR 5601(b)(1) for lack of a substantial constitutional question, which may represent a ruling on the merits.

appeal under CPLR 5602(a)(1)(i) on March 8, 1988[2]. Petitioner's motion was denied on June 7, 1988.

On August 23, 1988, Justice Marshall ordered that the time for filing this petition for writ of certiorari be extended to and including November 4, 1988 (Application A-140).

The jurisdiction of this court to review the judgment of the New York Court of Appeals is invoked under 28 U.S.C.§1257(3).

STATUTES INVOLVED

New York Education Law Title VIII Article 130 Subarticle 3 (Sections 6509 through 6511-a inclusive) and New York Public Health Law Title II-A section 230, in part.

These statutes are excerpted as relevant in the Appendix below, pages 4a through 21a.

STATEMENT OF THE CASE

Background and Disciplinary Proceedings

Petitioner is a practicing physician who specializes in Neurology and devotes most of his professional efforts to research. He has held a New York State medical license since July 27, 1979 and is currently registered to practice in New York.

In September, 1981, petitioner was charged by Nassau County (Indictment Number 53036) with a single count of Second Degree Sodomy (New York Penal Law §130.45). On January 20, 1984, petitioner entered a guilty plea to a misdemeanor count of Second Degree Sexual abuse (Penal Law §130.60), admitting a

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2. The two procedures (appeal as of right, motion for leave to appeal) can be pursued sequentially and in either order under CPLR 5514.

single act of sexual contact with an 11 year old male in December, 1979 (APP, pages 4-6)[3].

On October 2, 1984, petitioner was charged by New York State Board of Professional Medical Conduct (Hereinafter, BPMC) with professional misconduct (Case #4146). The sole specification in the charge, in petitioner's only disciplinary proceeding, was:

> Respondent is charged with having been convicted of a crime within the meaning of N.Y. Educ. Law §6509(5)(a)(i) (McKinney Supp 1983), in that:
>
> On or about January 20, 1984, in Nassau County Court, Repondent pleaded guilty to one Count of Sexual Abuse in the Second Degree, a class "A" misdemeanor, in that in or about December, 1979 Respondent subjected to sexual contact Edward Turner who was then 11 years old (App, pp 14,15) .

New York did not charge petitioner with practicing while impaired, as it might under Education Law §6509(3) (reprinted in Appendix below, page 4a).

During a hearing held before a hearing committee of the BPMC on October 17, 1984 and February 7, 1985 pursuant to New York Public Health Law §230.10(e,f), counsel for the Office of Professional Medical Conduct (Hereinafter, OPMC) introduced evidence solely to show that petitioner had been convicted (APP, pages 18, 76, and 99). Counsel for OPMC made no opening statement and introduced no professional opinion evidence about petitioner's psychological state or potential dangerousness that might have alerted petitioner to the fact that these were in question[4].

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3. The notation, APP, followed by a page number, refers to the two part appendix filed with petitioner's brief in his Article 78 proceeding before the New York Supreme Court, Appellate Division, Third Department, a copy of which was also filed in the New York Court of Appeals.

4. Two professional witnesses, originally scheduled to present testimony for OPMC, were barred from testifying because they had been given inadmissible documents to review (APP, p. 54-57, 74-75). No substitute witnesses appeared. Under more recent procedures under Public Health Law §230.7 (reprinted in

Petitioner presented written and personal testimony to his character, which indicated that the crime was alien to his character (APP, pp 18, 77-105, 112-116, 167, 168). In addition, petitioner offered limited testimony about the circumstances of his misconduct (APP, pp 111, 112, 135-149). His act was an isolated, spontaneous event which had been arranged by an acquaintance and which was not repeated because of petitioner's immediate remorse[5].

The hearing committee sustained the disciplinary charge. In its report of May 8, 1985 prepared under Public Health Law 230.10(g), the committee, despite the absence of any charge of impairment or any professional opinion evidence about petitioner's psychological state, stated in summary:

> "Petitioner's crime raises serious questions as to his emotional capabilities and weaknesses. This could present a critical danger to the Public in allowing him to continue practicing medicine (APP, p 26).

In recommending the penalty, the panel focussed almost exclusively on this question and recommended that petitioner be required to undergo seven psychiatric evaluations in the course of five years and to have continuous psychotherapy by another psychiatrist (APP, p 29) as a condition of probation for retaining his medical license.

Upon receiving the committee's report, petitioner submitted comments to the Commissioner of Education protesting the recommendation of this penalty as a clear violation of due process:

Appendix below, page 11a, as amended in L 1984 c 1005 §2, effective January 20, 1985), BPMC can have a physician evaluated for possible impairment prior to bringing any charges.

5. Petitioner was apprehended because, some 18 months later (June, 1981), he visited the same acquaintance who was then under police surveillance. During that visit, no children were present. In the eighteen months between his act of misconduct and his acquaintance's arrest (July, 1981), petitioner had the opportunity to repeat his misconduct. However, because he clearly recognized the wrongness of the act, he refused to do so (App, pp 28, 111, 112, 135, 136, 141, 143).

> "It is an axiom of due process and fundamental fairness that Respondent be served with those charges that are made against him and be given an opportunity to defend himself. . . If Respondent had been charged with being impaired, we would have had the opportunity to present evidence and testimony with respect to that charge and would have done so. (APP, p 190)[6].

Before a Regents Review Committee, petitioner subsequently argued that his, " . . . due process rights were violated, because he had never been informed that he was required to prove that he did not pose a danger to patients and was free of psychiatric impairment "(App, p 194)[7]. Petitioner also submitted two reports from psychiatric experts in sexual dysfunction. Dr. Berlin, Co-Director of the Johns Hopkins Sexual Disorders Clinic, wrote that:

> ". . . I see no evidence whatsoever that there is a likelihood that he will again act in a sexually inappropriate manner. I continue to believe that he is basically a responsible and mature individual who on an isolated occasion acted with poor judgment and who, given the consequence of that act, is highly motivated and unlikely to behave in a similar fashion again." (APP, p 179)

Dr. Siegel wrote, "I can unequivocally state that Dr. Hening has not been, is not, and will not be a threat to any patient he might treat" (APP, p 187)[8]. The psychiatrists both recommended that petitioner not be given a lengthy probation. After this meeting, the New York

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6. Additional portions of these comments are excerpted in the Appendix below, pages 22a and 23a.

7. The nature of petitioner's attorney's comments were indicated in an affidavit included in the Appendix to the Article 78 proceeding. Excerpts from that affidavit are reprinted in the Appendix, below, pages 23a and 24a.

8. Additional excerpts from these letters are reprinted in the Appendix below at pages 24a and 25a.

Board of Regents ordered petitioner's medical license to be suspended, but the suspension stayed, and placed him on probation for five years including seven psychiatric evaluations and possible mandatory therapy (APP, p 34). An order implementing this decision was issued by the New York Commissioner of Education on April 2, 1986 (APP, pp 35-38) (Excerpted in Appendix below, page 26a). Petitioner has in all regards complied with the terms of probation. Four psychiatric evaluations have been performed to date and all have found him fit to practice medicine. The most recent evaluation, excerpted in the Appendix below, page 27a, recommended that his probation be terminated[9].

Judicial Proceedings

Petitioner then brought a special proceeding under CPLR Article 78 in the New York Supreme Court, Appellate Division, Third Department. Petitioner requested termination of the required psychiatric evaluations and reduction of his probation, together with a declaration that he had not been shown to be impaired (APP, pp 214, 215). Among other bases for this relief, petitioner claimed:

> "Since Petitioner was never charged with being unfit or impaired, the penalty imposed on him deprived him of protected liberty and property interests without Due Process of Law, in contravention of both the Federal and State Constitutions. Petitioner was denied Notice and a Hearing on the issue of whether he was unfit or impaired." (App, p 212)[10]

In his brief, petitioner spelled out his substantive and procedural due process claims, citing federal Constitutional cases that dealt with

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9. A copy of this evaluation was submitted as part of petitioner's Motion for Leave to Appeal to the New York Court of Appeals (Motion for Leave, page 30).

10. Excerpts from the Article 78 Petition further spelling out petitioner's Claims and Requested Relief are found in the Appendix below, pages 28a and 29a.

relevant protected liberty interests, notice, a fair hearing, and the need for at least substantial evidence to prove psychiatric impairment (Brief Accompanying Article 78 Petition, filed with the Court of Appeals on Appeal, pages 13-24; hereinafter, PB)[11]. Petitioner argued that:

> "Because Petitioner was never formally charged with being psychologically impaired, but penalized for his impairment, he was deprived of his property, liberty, and reputational interests without Due Process of Law." (PB, p 13)

Petitioner also argued that , ". . . due process requires that a finding of psychological impairment should only be made on the basis of a full evaluation and expert testimony." (PB, p 11).

The Appellate Division rejected petitioner's constitutional claim in a memorandum opinion (132 A.D.2d 783, 517 N.Y.S. 2d 331) holding that:

> "Imposition of . . . [a] penalty [of periodic psychiatric evaluations and therapy] is not limited to cases in which the licensee was charged with the professional misconduct of practicing his profession while his ability was impaired or cases in which the licensee was found to be physically or mentally impaired." 132 A.D.2d at 783, 784, 517 N.Y.S.2d at 332.

Petitioner appealed this decision to the Court of Appeals, raising the same federal constitutional claims[12].

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11. Excerpts from the Article 78 Brief that further illustrate development of the federal Constitutional claims are found in the Appendix below, pages 30a - 36a.

12. Excerpts from petitioner's Jurisdictional Statement required by Court of Appeals Rule 500.2 and of his Jurisdictional Comments made pursuant to Rule 500.3 are reprinted in the Appendix below, pages 37a-38a and 39a-41a, respectively.

REASONS FOR GRANTING THE WRIT

The major issue presented is whether the state can Constitutionally impose a disciplinary penalty on a professional that includes repeated psychiatric evaluations and possible extended therapy without showing that he is impaired and dangerous. The writ should be granted because it raises important substantive and also procedural due process issues concerning state imposition of psychiatric surveillance (that is, confinement or restrictions on activity, imposed therapy, or repeated psychiatric evaluations) when it is imposed as a disciplinary penalty. The decision below conflicts with Constitutional principles derived from the Fifth and Fourteenth Amendments which have been established by this Court and expanded by lesser courts. It is a principle of substantive due process that psychiatric surveillance can only be imposed on a person who both suffers from a psychiatric impairment and, as a result, is dangerous or liable to cause harm. It is a principle of procedural due process that the state, before imposing psychiatric surveillance, must show that the person is impaired and dangerous by presenting suitable evidence to that effect after appropriate notice and a hearing at which the person has the opportunity to rebut the evidence. The decision below rejected both these principles, as well as the correlary principle that the psychiatric surveillance imposed can only be as extended and intrusive as necessary for the impairment and dangerousness shown. The writ should also be granted because professional discipline is an area of law of great public concern, which requires guidance from this Court for the development of procedures that will adequately protect both the private interests of professionals and the well being of the public when questions of impairment and dangerousness arise.

I. The decision below conflicts with principles established by this Court with respect to the important Constitutional issue of the individual's right to be free of unjustified psychiatric surveillance imposed by the state.

This Court and lesser courts in both the Federal and State systems have established the fundamental Constitutional principle based on the Fifth and Fourteenth Amendments that imposition of state mandated psychiatric surveillance (that is, confinement or restrictions on activity, imposed therapy, or repeated mandatory evaluations)[13] can only be justified if a person is psychologically impaired and also threatens some harm to himself or others[14]. This principle contains a core understanding that psychiatric surveillance must be appropriate. Before imposing the surveillance, the state

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13. Petitioner has challenged only psychiatric surveillance, which is an extended imposition of psychiatric control and scrutiny. Petitioner has never challenged two other state responses to possible psychological impairment. First, state response to an emergency (emergency intervention) may require confinement, restraints, involuntary medication, or suspension of a professional's license. Clearly, petitioner's penalty, coming some seven years after the single underlying act of misconduct which the state held might justify surveillance, was not a response to any emergency. Second, the state may require evaluation to determine whether a state of psychological impairment exists, as in assessing competency before trial or examing a professional for possible impairment. Psychiatric surveillance, like petitioner's, is not an evaluative process: it has been imposed as a disciplinary penalty. Furthermore, an evaluation must be of limited duration. Whatever the outer bounds of that duration, it is certainly exceeded by petitioner's five year penalty including seven independent examinations. New York State now provides for both emergency suspension of a physician's license, which might be due to his impairment, in Public Health Law §230.12 (See Appendix below, page 11a) and for a mandatory examination of a physician for impairment, in Public Health Law §230.7 (See Appendix below, page 16a and 17a).

14. Throughout this petition, petitioner will refer to this potential for harm as dangerousness. Such dangerousness is to be understood broadly, as this Court did in *Jones v. United States*, 463 U.S. 354, 365 n. 14, 103 S.Ct. 3043, 3050 n. 14, 77 L.Ed.2d 694 (1983), and would include potential harm to clients or the public because of inappropriate professional behavior.

must provide fair procedures which demonstrate the impairment and dangerousness and provide the opportunity for the person to show they do not obtain. Moreover, the surveillance, once begun, can only be sustained as long as its justifications persist. The person must have the opportunity, at reasonable periods, to show that the surveillance can no longer be justified. As Chief Justice Burger wrote about commitment to a psychiatric institution, one highly intrusive form of psychiatric surveillance:

> "Commitment must be justified on the basis of a legitimate state interest, and the reasons for committing a particular individual must be established in an appropriate proceeding. Equally important, confinement must cease when those reasons no longer exist. See McNeil v. Director, Paxtuent Institution, 407 U.S. 245, 249-250, 92 S.Ct. 2083, 2086-2087, 32 L.Ed.2d 719 (1982); Jackson v. Indiana, 406 U.S. 715, 738, 92 S.Ct. 1845, 1858, 32 L.Ed.2d 435 (1972)." (Burger, CJ, concurring) *O'Connor v. Donaldson*, 422 U.S. 563, 580, 95 S.Ct. 2486, 2496, 45 L.Ed.2d 396 (1975)

The decision below conflicts with this principle. Petitioner is required to undergo seven psychiatric evaluations over the course of five years and, without any further hearing, can be compelled to have regular psychiatric therapy during the course of those years without his ever having been psychologically impaired or dangerous[15]. Indeed, the state has never attempted to establish that he is psychiatrically impaired or dangerous.

This Court has held that psychiatric surveillance implicates substantive due process rights because it abridges fundamental personal liberty interests. For example, in *Vitek v. Jones*, 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980), this Court delineated

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15. Multiple psychiatric evaluations were prepared after examination of petitioner both on his own initiative (See Appendix below, page 24a and 25a) and in the course of his probation (See Appendix below, page 27a) over a four year period (1984 - 1988). These have all indicated that petitioner was neither impaired, nor dangerous.

some of the interests that psychiatric surveillance could abridge: liberty itself which would be limited by confinement in a psychiatric facility, social integrity and well-being that would be harmed by the stigma of psychiatric confinement, and personal security that would suffer from the intrusions of psychiatric therapy (*Vitek*, *supra*, at 445 U.S. 492-493, 100 S.Ct. 1263). Petitioner asserted analagous interests in the New York courts (See Appendix below, page 39a). Indeed, his disciplinary penalty infringes upon each. First, he loses freedom because he must report for evaluation and therapy, thereby losing time from pursuit of his career or other interests[16]. Second, he suffers the loss of professional reputation through the stigma imposed by the required psychiatric surveillance. And, finally, he may suffer infringement on personal integrity because of the required surveillance[17]. These rights then required substantive protection and could only be extinguished if a countervailing state interest existed.

When psychiatric surveillance is to be imposed, the countervailing state interest arises from a legitimate desire to prevent harm. Such an interest is only present if the person is impaired, and therefore can benefit from psychiatric surveillance, and dangerous, thereby threatening harm, at the time of the surveillance itself. See, for example, *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1980); *Project Release v. Prevost*, 722 F.2d 960 (CA2 NY 1983); *Matter of Carl C*, 126 A.D.2d 640, 511 N.Y.S.2d 144 (2d Dept 1987). Certainly, if a physician were psychiatrically impaired, as by a character disorder, and posed a danger to his patients, it would be consistent with this principle for

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16. In addition, he loses a property interest, because he is required to pay for any evaluation or therapy (See, Appendix below, page 26a).

17. Both psychiatrists who wrote to the Regents' Review Committee on petitioner's behalf indicated that a prolonged period of probation could be psychologically harmful to him (See, Appendix below, pages 24a and 25a). Dr. Siegel wrote that, "... the five year probationary period imposed on him represents an overly severe penalty with potentially very damaging effects, both professional and psychological."

the state to impose psychiatric surveillance. However, the decision below is in conflict with this principle in two respects. First, it denies that there is a need to show impairment and dangerousness, because it states that a penalty of surveillance can be imposed even when a licensee has not been found to be impaired or dangerous (*Matter of Hening v. Ambach*, 132 A.D.2d 783, 784, 517 N.Y.S. 2d 331, 332). Instead, proof of other misconduct is sufficient to extinguish the professional's protected interests and to satisfy substantive due process. But, according to the Constitutional principle, it is not enough to show some other deficiency. For example, this Court has consistently found that criminal conviction cannot form a basis for abrogating liberty interests in remaining free of imposed psychiatric surveillance. In *Baxtrom v. Herold*, 383 U.S. 107, 86 S.Ct. 760, 15 L.Ed.2d 620 (1966), this Court held that criminal conviction did not justify reduced procedural and substantive protections against indefinite civil commitment. In *Vitek v. Jones*, 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980), the Court found that " . . . a convicted felon also is entitled to the benefit of procedures appropriate in the circumstances before he is found to have to have a mental disease and transferred to a mental hospital." *Vitek, supra*, at 445 U.S. 493, 100 S.Ct. 1263. The same principle holds when therapy such as drug treatment is considered. See *Bee v. Greaves*, 744 F.2d 1387 (CA10 1984) (pretrial detainee has a protected liberty interest in remaining free from psychiatric medications). Therefore, the fact that petitioner was convicted of an isolated act of misconduct could not justify psychiatric surveillance. Indeed, isolated and past acts generally form only a weak basis for inferring psychological impairment. As the circuit Court of Appeals held in *Stepp v. Estelle*, 524 F.2d 447, 454-455 (CA5 TX 1975), even a bonafide suicide attempt, standing alone, would not prove mental illness or incapacity. Second, by grounding petitioner's penalty entirely on misconduct that had occurred seven years earlier, the decision below conflicts with the principle that surveillance must be based on current impairment and dangerousness. For instance, in *Jones v. United States*, 463 U.S. 354, 103 S.Ct. 3043, 77 L.Ed.2d 694 (1983), this Court accepted the confinement of an insanity acquitee without a preliminary

hearing. The confinement was justified, first, because he had been shown to be both impaired, by his insanity plea, and dangerous, by virtue of his criminal act, and, second, because he would have the opportunity to show that he was no longer impaired or dangerous both fairly promptly and at reasonable intervals. Confinement must cease when, ". . . he has regained his sanity or is no longer a danger to himself or society" *Jones*, *supra*, at 463 U.S. 370, 103 S.Ct. 3053. Surveillance must be proportionate to its justification. "At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson v. Indiana*, 406 U.S. 715, 738, 92 S.Ct. 1845, 1858, 32 L.Ed.2d 435 (1972). The penalty imposed on petitioner provides no mechanism for him to terminate the period of surveillance, which will continue until a full twelve years after his single act of misconduct. By accepting this penalty, the decision below conflicts with the principle of proportionate surveillance.

To show that surveillance does not unduly burden liberty interests, the state must provide a suitable procedure. This includes the key elements of due process, an appropriate and timely notice that the state seeks to find a person impaired and dangerous and a hearing adequate to determine whether in fact he is. See, e.g., *Mulane v. Central Hanover Trust Co.*, 339 U.S. 306, 313, (1950) (appropriate notice and hearing fundamental to due process); *Vitek v. Jones*, 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980); *Project Release v. Prevost*, 722 F.2d 960 (CA2 NY 1983). The state must provide at least substantial evidence of the impairment and dangerousness (cf., *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1980)). The decision below conflicts with this principle because it permits surveillance to be imposed without any notice that the state sought to find petitioner impaired[18] and without any hearing directed to the issue of his

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18. The only notice petitioner received indicated that he was charged with being convicted of a crime based on a single act of misconduct that occurred six years before the notice (See Statement of Facts, *supra*, page 4).

psychological state. Moreover, no professional opinion was introduced by the state, and this is crucial to such cases, since the determination that a person is impaired or dangerous is not merely factual, but " ... turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists." *Addington v. Texas*, 441 U.S. 418, 429, 99 S.Ct. 1804, 1811, 60 L.Ed.2d 323 (1980). Therefore, the state failed to provide substantial evidence that might have shown petitioner to be impaired and dangerous.

It might be objected that this Court has previously dealt with pscyhiatric surveillance causing far more severe intrusions on liberty that the repeated examinations and possible psychotherapy required by petitioner's penalty. However, in the due process protection of Constitutional rights, it is the nature and not the weight of the interest which is first to be considered. See *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571, 92 S.CT. 2701, 2706, 33 L.Ed.2d 548 (1972). Even rather minor property interests are worthy of appropriate due process protection. See *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978). Therefore, the principle that psychiatric surveillance can only be imposed if a person is impaired and dangerous extends to penalties such as petitioner's. Indeed, it may be more difficult to impose less intrusive forms of surveillance, because they would generally be applied to those less impaired than those committed or subjected to intrusive therapies and, therefore, their necessity would be much harder to establish. See, Herr, Arons, Wallace, *Legal Rights and Mental Health Care*, 1983, at 69-72. Someone who is able to freely live in the community without harm to himself or herself and without harm to others has a firm Constitutional right not to have psychiatric surveillance imposed unless the state can show that it is necessary to maintain that person's state. Professionals, whose conduct can pose dangers to the public, should be closely scrutinized for whether they are impaired and dangerous, but the state must still show that they require surveillance before imposing it. Moreover, a professional's interest in remaining free of psychiatric surveillance is significant since such surveillance may severly impact on his possible employment. This Court has " . . . recognized the severity of

depriving a person of the means of livelihood." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 1494, L.Ed.2d (1985). For a professional, employment is also a career and when that is affected, the professional loses more than simple economic opportunity. He loses status, self-respect, and often an investment of many years of training. To maintain his career, reputation is critical and can be extremely vulnerable to the stigma of psychiatric surveillance. A physician who is suggested to be psychologically impaired or dangerous to patients can face almost insurmountable obstacles in finding a professionally esteemed position.

In summary, the decision below should be reviewed because it authorizes psychiatric surveillance without established justification in conflict with important Constitutional principles that should act to protect a professional's liberty interests.

II. Because of current concern about the fitness of professionals to practice, it is important that Constitutional guidelines be established for the imposition of penalties that include psychiatric surveillance.

Petitioner's writ should be granted because issues of professional discipline are of substantial public importance. First, in recent years, public concern has risen about the practice of incompetent or impaired professionals. This rising concern has been paralleled by the development of more aggressive procedures for disciplining professionals. The issue of the substantive and procedural due process of rights of professionals suspected of impairment is, therefore, likely to arise more and more frequently. Second, the procedures established for professional discipline often allow great flexibility in the penalty imposed both as to kind and degree. Such flexibility opens an opportunity for abuse of psychiatric surveillance and the denial of professionals fundamental rights.

Professional discipline, particularly involving the medical profession, has become a salient and contested public issue. The number of physicians subjected to discipline has greatly increased[19] and many public critics call for still much more scrutiny and rigorous discipline of physicans[20]. State disciplinary agencies are being given greater budgets and more authority to investigate while the number of specified areas of misconduct is increased. See, for example, A Fresh Approach to Discipline, 172 Illinois Medical

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19. For example, after Florida substantially revised disciplinary procedures in 1979, there was a three-fold increase in the number of physicians disciplined (Feinsten, *The Ethics of Professional Regulation.* 312 New Eng J Med 801 (1985)).

20. See, for example: Rosenberg, *Tougher Doctor-Policing Laws*, Med. Econ. 108 (April, 1979); Graham, *Bad Medicine: states move to catch incompetent doctors, but progress is uneven.* Wall Street J 1 (May 1, 1981); Derbyshire, *Obstacles to enforcement of discipline.* Hospital Practice 252 (October, 1983).

Journal 191-193 (1987). Other changes include the development of data banks[21], mandatory reporting schemes[22], and new forms of penalties, including many that are remedial in nature[23].

One of the greatest concerns expressed is about the impairment of professionals[24]. Physicans are frequently disciplined for impairment due to drug abuse or mental illness[25]. The potential impact of impairment can be gleaned from estimates that as many as 5 to 12% of all physicians are impaired in a way that impacts adversely on their practice. See Robinowitz. *The Impaired Physician and Organized Medicine*. In: Scheiber, Doyle. *The Impaired Physician* (1983), at 147. While these considerations indicate that impairment is an important issue, they do not show what response the state might make. A recent report indicates that physician impairment may be effectively handled by suitable probation, thereby satisfying the state's interest in protecting the public from harm at the same time as the value of the physician's career and expertise are not lost through license revocation. See Shore. *The impaired physician: Four years after probation*. 248 J American Med Assoc 3127-3130 (1982) (with review of earlier studies showing similar conclusion). Accord, Grad, Marti, *Physician's Licensure and Discipline* (1979). In the face of these

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21. Two data banks are currently maintained by the Federation of State Medical Boards and the American Medical Association, respectively. A national data bank was mandated by the Health Care Quality Improvement Act of 1986, Title IV of Public Law 99-660. See Breaden, *The physician disciplinary data bank*. 172 Ill Med J 197 (1987).

22. See: Comment, *The impaired physician: an old problem creates the need for new legislation*, 26 St. Louis Law J 727 (1982).

23. See, Grad, Marti, *Physician's Licensure and Discipline* 42 (1979).

24. See, for example: Shore. *The impaired physician: Four years after probation*. 248 J American Med Assoc 3127 (1982).

25. See, for example: Derbyshire, *Offenders and Offenses*. Hospital Practice 98A, (March, 1984)

concerns, almost all states have now established specific programs for dealing with physician and related health professional impairment[26] and many states have specific procedures for compelling an examination for impairment[27]. It, therefore, seems clear that the issue of impaired physicians is an important one and that questions about accurate identification of impairment and suitable procedural protection of both state interests and individual professional rights are likely to arise frequently.

Not only are issues of impairment and possible related psychiatric surveillance important and likely to arise frequently, the procedures adopted for professional discipline often raise particular due process concerns. A number of states[28], including New York, allow the disciplinary authorities great discretion in imposing disciplinary penalties. Unlike the penal law, where punishments are graded according to severity of offence, statutes authorising professional discipline may merely sets out a list of offences (New York Education Law §6509 and §6509-a, see Appendix below, pages 4a-6a) and another list of permissible penalties (Education Law §6511 and §6511-a, see Appendix below, pages 9a and 10a). Any penalty may be applied to any offence[29]. Moreover, the penalties established have two distinct characters. On the one hand

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26. According to one survey, 47 states have some special programs for impaired physicians, 2 are implementing such programs, and only one state (Arkansas) provides no special program. Scheiber, Doyle, The Impaired Physician 173-185 (1983).

27. As of 1979, 34 states had such procedures. Grad, Marti, *Physician's Licensure and Discipline* 33 (1979).

28. Among other states: Connecticut (Connecticut Gen Statutes Annotated 1969 and 1988 Supplement, Titles 19-a-17 and 20-45); Georgia (Official Code Annotated, 1988, Title 43-34-37(a) and (b)(1)); and Texas (Revised Civil Statutes, 1988 Supplement, Article 4495b, Sections 3.08 and 4.13).

29. Penalties are reviewed only for excessiveness and a penalty may be reversed only it ". . . shocks one's consciousness" *Pell v. Board of Education, Etc.*, 34 N.Y.2d 222, 240, 356 N.Y.S.2d 833, 847 (1974).

there are punishments (censure, fine, suspension, revocation); on the other hand are remedial measures (mandatory therapy, drug testing, required educational courses, and some forms of probation). While punishments might be reviewed for excessiveness, remedial measures should be reviewed for appropriateness[30]. It would seem absurd to require a course of education where no deficiency in performance has been shown or therapy where there is no illness. Although the inappropriateness of a penalty may lead to its vacation on review (*Ahsaf v. Nyquist*, 37 N.Y.2d 182 (1975)(penalty depended on uncharged specification), *Krasowski v. State Education Department*, 132 A.D.2d 120, 521 N.Y.S.2d 820 (3rd Dept, 1987)[31](penalty depended on charge not sustained)), the court below has clearly held in petitioner's case that the state bears no general burden to prove a given penalty is appropriate by providing specific notice and a suitable hearing addressed to that issue. This opens up the possibility, cited by petitioner throughout his case below, that the absence of appropriate procedures may lead to abusive employment of psychiatry as a tool to carry out unrelated state purposes (See Appendix below, page 24a). We have long decried such abuses in the Soviet system, which has used

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30. For discussion of types of penalties and appropriate application, See Grad, Marti, *Physician's Licensure and Discipline* 42-45 (1979)

31. *Krasowski* is a case with remarkable parallels to petitioners. Like petitioner, Krasowski was convicted of a single offence, shown to involve sexual misconduct with a minor, outside his profession. Like petitioner, he presented evidence that he was not impaired. However, unlike petitioner, Krasowski was charged with being impaired and the charge was not sustained. Nevertheless, a penalty of psychiatric surveillance was imposed. A panel of the reviewing court (Appellate Division, Third Department) vacated this penalty on the grounds that it was inappropriate. The only distinction between Krasowski and petitioner was that Krasowski was charged with being impaired, while petitioner was not. Therefore, Krasowski had an opportunity to show he was not impaired. If the state wisely had elected not to charge him, they would have been free under the reasoning in petitioner's case to impose the penalty they wished. This stark contrast underlines the need for the procedural protections requested by petitioner.

psychiatric surveillance as a punishment to suppress dissent[32]. To guard against such abuses, the basic principle that psychiatric surveillance can only be imposed where there is impairment and dangerousness should be strictly maintained.

Procedurally, requiring a showing of impairment and dangerousness after notice and a hearing, should be quite feasable in professional discipline. When it comes to determing what process is due in a given setting, this Court has established that there must be a balancing of competing individual and state interests, including consideration of the costs of a given procedure to the state and the benefits of that procedure in achieving accurate fact finding (*Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). In the setting of professional discipline, both the individual and the state have distinctive interests. For the individual, one key interest is the effect of imposed psychiatric surveillance on his employment, livelihood, and career. On the other hand, the state, whose role is to certify professionals as acceptable to practice, has an interest in preventing them from practicing or limiting their practice if they are impaired. But the state's interest only holds if the professional is, in fact, impaired and dangerous: the state has no interest in penalizing a professional with psychiatric surveillance if the professional is not impaired. It is also the case that the state has an interest in the professional's activities and, indeed, may have invested considerably in his training. This makes an erroneous imposition of psychiatric surveillance distinctly against the state's interest as well as that of the professional. Since every state already has some mechanism for professional discipline which includes notice and a hearing[33], the requirement to show impairment and dangerousness would require no substantial change in pre-existing procedures. It would merely require a specific showing of

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32. For a review of the abuses imputed to the Soviet system of psychiatry as an organ of state control of dissident acts and thoughts, see for example, Bloch, Reddaway, *Soviet Psychiatric Abuse* (1985); Nekipilov, *Institute of Fools* (1980).

33. See Grad, Marti, *Physician's Licensure and Discipline* 30-36 (1979).

impairment or dangerousness, which would usually require expert testimony from the state, after proper notice. In this balance, appropriate procedure would protect the professional's interest and enhance accuracy, thereby serving the state's interest as well, without any significant increase in burden on the state.

Therefore, it is evident that discipline of professionals for impairment and determination of professional impairment is an issue of importance to the public and to the states. A review of the fundamental rights of professionals in this area and the assessment of the Constitutionally required procedure for determining professional impairment and dangerousness is needed to be sure that such discipline is fair and serves the public interest.

CONCLUSION

For these various reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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November 3, 1988

APPENDIX TO PETITION

I. DECISIONS BELOW

Order of New York Court of Appeals Dismissing Petitioner's Appeal on Constitutional Grounds. Reported at 70 N.Y.2d 926, 524 N.Y.S.2d 433.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dimissed without costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

Order of New York Court of Appeals Denying Petitioner's Motion for Leave to Appeal. Reported at 72 N.Y.2d 802, 530 N.Y.S. 2d 554.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

Opinion of the New York Supreme Court, Appellate Division, Third Department (Opinion by Main, J.; Kane, J.P. and Casey, Weiss, and Mikoll, JJ., concur). Reported at 132 A.D. 2d 783, 517 N.Y.S. 2d 331.

Proceeding pursuant to CPLR article 78 (initiated in this court pursuant to Education Law §6510-a[4]) to review a determination of respondent Commissioner of Education which suspended petitioner's license to practice medicine in New York State for five years, but stayed the execution of the suspension and placed petitioner on probation for that period.

In 1984, petitioner, a licensed physician, pleaded guilty to a charge of sexual abuse in the second degree, a misdemeanor. The incident which resulted in this conviction did not involve petitioner in his professional capacity. Thereafter, the State Board for Professional Medical Conduct (hereinafter the Board) charged petitioner with professional misconduct pursuant to Education Law §6509(5)(a)(i) based on his criminal conviction. At a hearing before the Board's hearing committee, petitioner admitted the charge; thus, the only issue remaining for resolution was the penalty to be imposed. Finding petitioner guilty as charged, the hearing committee recommended that petitioner's license be suspended but that the suspension be stayed and petitioner placed on probation for five years, that petitioner submit to periodic psychiatric evaluations and that he have a program of therapy with a separate therapist. The Board of Regents ultimately accepted this recommendation, with some modifications.

Petitioner now asserts that the hearing committee could not recommend a penalty involving periodic psychiatric evaluations and therapy, since the penalty must have been based upon the assumption that petitioner was psychologically impaired and he was not charged with professional misconduct in that regard (see, Education Law §6509[3]) and the hearing commmittee did not find that he was psychologically impaired. We find this contention to be without merit. Education Law §6511(2)(c) permits suspension of a professional's license "until the licensee successfully completes a course of therapy or treatment prescribed by the regents".

Imposition of this penalty is not limited to cases in which teh licensee was charged with the professional misconduct of practicing his profession while his ability was impaired or cases in which the licensee was found to be physically or mentally impaired. Since the penalty imposed was within the confines of the penalties set forth in Education Law §6511, we cannot say that the Board of Regents was without power to impose the penalty.

The only other issue for our consideration is whether the penalty imposed is too severe. Our power to review a sanction imposed by respndents is strictly limited, and we may interfere with the imposition of a sanction only when the penalty imposed is so disproportionate to the offense to be shocking to one's sense of fairness (*Matter of Eufemio v University of State of N.Y.*, 130 A.D.2d 880, 516 N.Y.S.2d 129; *see, Matter of Purdy v. Kreisberg*, 47 N.Y.2d 354, 360, 418 N.Y.S.2d 329, 391 N.E.2d 1307; *Matter of Kay v. Board of Regents of Univ. of State of N.Y.*, 108 A.D.2d 1039, 485 N.Y.S.2d 855). In light of the nature of petitioner's misconduct, we cannot say that the penalty imposed here is disproportionate to the offense, especially since the penalty imposed was far less severe than the penalty that could have been imposed under Education Law §6511. Accordingly, the determination should be confirmed.

Determination confirmed, and petition dismissed, without costs.

II. STATUTES INVOLVED

[Some sections of the Statutes are omitted or excerpted.]

A. EDUCATION LAW

TITLE EIGHT -- THE PROFESSIONS

ARTICLE 130 -- GENERAL PROVISIONS

SUBARTICLE 3. PROFESSIONAL MISCONDUCT

(McKinney's Consolidated Laws of New York Annotated, 1985 and 1988 Supplement)

§6509. Definitions of Professional Misconduct.

Each of the following is professional misconduct, and any licensee found guilty of such misconduct under the procedures described in section sixty-five hundred ten shall be subject to the penalties prescribed in section sixty-five hundred eleven:

(1) Obtaining the license fraudulently.

(2) Practicing the profession fraudulently, beyond its authorized scope, with gross incompetence, with gross negligence on a particular occasion or negligence or incompetence on more than one occasion,

(3) Practicing the profession while the ability to practice is impaired by alcohol, drugs, physical disability, or mental disability,

(4) Being habitually drunk or being dependent on, or a habitual user of narcotics, barbiturates, amphetamines, hallucinogens, or other drugs having similar effects,

(5)(a) Being convicted of committing an act constituting a crime under:

(i) New York State Law or,

(ii) Federal Law or,

(iii) The law of another jurisdiction and which, if committed within this state, would have constituted a crime under New York State law;

(b) Having been found guilty of improper professional practice or professional misconduct by a duly authorized professional disciplinary agency of another state where the conduct upon which the finding was based would, if committed in New York state, constitute professional misconduct under the laws of New York state;

(c) Having been found by the commissioner of health to be in violation of article thirty-three of the public health law;

(d) Having his license to practice medicine revoked, suspended or having other disciplinary actions taken, or having his application for a license refused, revoked or suspended or having voluntarily or otherwise surrendered his license after a disciplinary action was instituted by a duly authorized licensing agency of another state, where the conduct resulting in the revocation, suspension or other disciplinary action involving the license or refusal, revocation or suspension of an application for a license or the surrender of the license would, if committed in New York state, constitute professional misconduct under the laws of New York state.

(6) Refusing to provide professional service to a person because of such person's race, creed, color, or national origin,

(7) Permitting, aiding or abetting an unlicensed person to perform activities requiring a license,

(8) Practicing the profession while the license is suspended, or wilfully failing to register or notify the department of any change of name or mailing address, or, if a professional service corportation wilfully failing to comply with sections fifteen hundred three and fifteeen hundred fourteen of the business corporation law,

(9) Committing unprofessional conduct, as defined by the board of regents in its rules or by the commissioner in regulations approved by the board of regents,

(10) A wilful violation by a licensed physician of subdivision eleven of section two hundred thirty of the public health law, or

(11) A violation of section twenty-eight hundred three-d or twenty-eight hundred five-k of the public health law.

(12) Failure to comply with an order issued pursuant to subdivision seven or seventeen of section two hundred thirty of the public health law.

§6509-a. Additional definition of professional misconduct; limited application.

[This section proscribes fee splitting.]

§6510. Proceedings in cases of professional misconduct.

In cases of professional misconduct the proceedings shall be as follows:

[1, 2, and 3 deal with procedures for professions other than the medical professions. See §6510-a, *infra*.]

4. Regents decision procedures.

a. Regents review committee. The transcript and report of the hearing panel or the transcript and report of the hearing officer made pursuant to subdivision nineteen of section two hundred thirty of the public health law, shall be reviewed at a meeting by a regents review committee appointed by the board of regents. The regents reveiw committee shall consist of three members, at least one of whom shall be a regent.

b. Regents review commitee meetings. The review shall be based on the transcript and the report of the hearing panel or of the hearing officer made pursuant to subdividsion nineteen of section two hundred thirty of the public health law. The licensee may appear at the meeting, and the regents review committee may require the licensee to appear. The licensee may be represented by counsel. The department shall notify the licensee at least seven days before

the meeting (1) of the time and place of the meeting, (2) of his right to appear, (3) of his right to be represented by counsel, (4) whether or not he is required to appear, and (5) of such other information as may be considered appropriate. After the meeting, the regents review committee shall transmit a written report of its review to the board of regents. [The remainder of this sub-section b deals with expedited review procedures for professionals other than physicians.]

c. Regents decision and order. The board of regents (1) shall consider the transcript, the report of the hearing panel, and the report of the regents review committee, (2) shall decide whether the licensee is guilty or not guilty on each charge, (3) shall decide what penalties, if any, to impose as prescribed in section sixty-five hundred eleven of this article, and (4) shall issue an order to carry out its decisions. Such decisions shall require the affirmative vote of a majority of the members of the board of regents. If the board of regents disagrees with the hearing panel's determination of not guilty, it shall remand the matter to the original panel for consideration or to a new panel for a new hearing. The panel's determination of not guilty on reconsideration or a new hearing shall be final. The order shall be served upon the licensee personally or by certified mail to the licensee's last known address and such service shall be effective as of the date of the personal service or five days after mailing by certified mail. [The remainder of c deals with surrender of licenses.]

[5 deals with court review for other than the medical profession.]

6. The provisions of subdivisions one through four of this section shall not be applicable to proceedings in cases of professinal misconduct involving the medical profession, except as provided for in paragraph m of subdivision ten of section two hundred thirty of the public health law.

[7 and 8 deal with expert witnesses and files.]

§6510-a. Proceedings in cases of professional misconduct involving the medical profession.

1. Prehearing procedures, hearing procedures and summary procedures. Prehearing procedures, hearing procedures and summary action procedures in cases of professional misconduct involving the medical profession shall be conducted pursuant to the provisions of Title II-A of article two of the public health law.

2. Regents decision and order. Within sixty days of the transfer of a case of professional misconduct involving the medical profession by the commissioner of health pursuant to section two hundred thirty of the public health law, the board of regents (a) shall consider the transcript, exhibits and other evidence, if any, the findings, conclusions and recommendation of the committee on professional misconduct and the recommendation of the commissioner of health, (b) shall decide whether the licensee is guilty or not guilty on each charge, (c) shall decide what penalties, if any, to impose as prescribed in section sixty-five hundred eleven of this article, and (4) shall issue an order to carry out its decisions. Such decisions shall require the affirmative vote of a majority of the members of the board.

[3 deals with time limits.]

4. Court review procedures. The decisions of the board of regents may be reviewed pursuant to the proceedings under article seventy-eight of the civil practice law and rules. Such proceedings shall be returnable before the appellate division of the third judicial department, and such decisions shall not be stayed or enjoined except upon application to such appellate division after notice to the attorney general.

§6510-b. Temporary surrender of licenses during treatment for drug or alcohol abuse.

[This section sets up a mechanism for professionals impaired by substance abuse to undergo treatment without formal disciplinary penalty. For comparable regulation of physicians, see Public Health Law §230.13, *infra*.]

§6511. Penalties for Professional Misconduct.

The penalties which may be imposed by the board of regents on a present or former licensee found guilty of professional misconduct (under the definitions and proceedings prescribed in sections sixty-five hundred nine, sixty-five hundred ten and sixty-five hundred ten-a of this article) are: (1) censure and reprimand, (2) suspension of license, (a) wholly, for a fixed period of time; (b) partially, until the licensee successfully completes a course of retraining in the area to which the suspension applies; (c) wholly, until the licensee successfully completes a course of therapy or treatment prescribed by the regents; (3) revocation of license, (4) annulment of license or registration, (5) limitation on registration or issuance of any further license, (6) a fine not to exceed ten thousand dollars, upon each specification of charges of which the respondent is determined to be guilty, (7) a requirement that a licensee pursue a course of education or training, and (8) a requirement that a licensee perform up to one hundred hours of public service, in a manner and at a time and place as directed by the board. The board of regents may stay such penalties in whole or in part, may place the licensee on probation and may restore a license which has been revoked. Any fine imposed pursuant to this section or pursuant to subdividision two of section sixty-five hundred ten of this article may be sued for and recovered in the name of the people of the state of New York in an action brought by the attorney general. In such action the findings and determination of the board of regents or of the violations committee shall be admissible evidence and shall be conclusive proof of the violation and the penalty assessed.

§6511-a. Probation for professional misconduct involving physicians, physician's assistants and specialists' assistants.

The order of the board of regents imposing probation in professional misconduct cases involving physicians, physician's assistants and specialists' assistants may include (a) a review of the professional performance of the licensee by randomly slecting office records, patient records and hospital charts, (b) quarterly visits by the licensee to a member of the state board for professional medical conduct or an employee of the office of professional medical conduct, (c) appointing another physician to monitor the licensee's practice, (d) auditing of the licensee's billings for services rendered during probation, (e) requiring the licensee to submit on a random basis to tests for the presence of alcohol or drugs, (f) requiring the licensee to obtain additional training prior to completion of the probation, (g) requiring the licensee to work in a supervised setting, and (h) such additional requirements as may be specified by the board of regents pursuant to regulation. The decision and order of the board of regents placing a licensee on probation shall set forth the specific terms and conditions of the probation. The commissioner of health is authorized to monitor physicians, physician's assistants and specialists' assistants who have been placed on probation pursuant to an order of the board of regents. If the board of regents determines a licensee has violated any term or condition of probation, they may impose any additional penalty authorized pursuant to section sixty-five hundred eleven of this article.

B. PUBLIC HEALTH LAW

TITLE II-A. PROFESSIONAL MEDICAL CONDUCT.

(McKinney's Consolidated Laws of New York Annotated, 1971 and 1988 Supplement)

§230. State board for professional medical conduct; proceedings.

[1 through 6 deal with the establishment of the board and its structure.]

7. The board, by its committees on professional conduct, shall conduct disciplinary proceedings as prescribed in this section and shall assist in other professional conduct matters as prescribed by the commissioner. A committee on professional conduct, on notice to the physican and after affording the physician, the office of professional medical conduct, and their attorneys an opportunity to be heard, shall have the authority to direct a physician to submit to a medical or psychiatric examination when the committee has reason to believe the physician may be impaired by alcohol, drugs, physical disability or mental disability. The committee, with the advice of the physician and the office of professional medical conduct, shall designate the physician who will conduct the examination. The results of the examination shall be provided by the examining physician to the committee, the physician, and the office of professional medical conduct. The physician may also obtain a physician to conduct an examination the results of which shall be provided to the committtee and the office of professional medical conduct.

[8 and 9 deal with committee member liability and disclosure]

10. Professional misconduct proceedings shall consist of:

(a). Investigation. The board for professional medical conduct, by the director of the office of professional medical conduct, may investigate on its own any suspected professional misconduct, and shall investigate each complaint received regardless of the source. If the director of the office of professional medical conduct, after obtaining the concurrence of a majority of a committee on professional conduct of the board for professional medical conduct, determines that a hearing is warranted he shall direct counsel to prepare the charges within fifteen days thereafter. If the director determines after consultation with a committee on professional conduct that: (i) evidence exists of a single incident of negligence or incompetence, a pattern of inappropriate prescribing, or impairment by drugs, alcohol, physical or mental disability; (ii) a recommendation was made by a county medical society or the medical society of the state of New York that warrants further review; or (iii) the facts underlying a verdict in a medical malpractice action warrant further review, the director, in addition to the authority set forth in this section, shall be authorized to conduct a comprehensive review of patient records and office records of the licensee. The licensee shall cooperate with the investigation. If there is a question of alcoholism, alcohol abuse, drug abuse or mental illness, the director may refer the matter to a physican committee, as referred to in subparagraph (ii) of paragraph (c) of subdivision eleven of this section.

(b) Charges. The charges shall state the substance of the alleged professional misconduct and shall state concisely the material facts but not the evidence by which the charges are to be proved.

(c) Notice of hearing. The board shall set the time and place of the hearing which shall not be later than thirty-five days from the date on which the charges were served. The notice of hearing shall state (1) the date, time and place of the hearing, (2) that the licensee may file a written answer to the charges no later than ten days prior to the hearing, (3) that the licensee shall appear personally at the hearing

and may be represented by counsel, (4) that the licensee shall have the right to produce witnesses and evidence in his behalf, to cross-examine witnesses and examine evidence produced against him, and to have subpoenas issued in his behalf to require the production of witnesses and evidence in manner and form as prescribed by the civil practice law and rules, (5) that a stenographic record of the hearing will be made, and (6) such other information as may be considered appropriate by the committee.

(d) Service of charges and of notice of hearing. A copy of the charges and the notice of the hearing shall be served on the licensee personally by the board at least twenty days before the hearing. If personal service cannot be made after due diligence and such fact is certified under oath, a copy of the charges and the notice of hearing shall be served by registered or certified mail to the licensee's last known address by the board at least fifteen days before the hearing.

(e) Committee hearing. The hearing shall be conducted by a committee on professional conduct. The members of the hearing committee shall be appointed by the chariman of the board who shall designate the committee chairman. In addition to said committee members, the commissioner shall designate an administrative officer, admitted to practice as an attorney in the state of New York, who shall have the authority to rule on all motions, procedures and other legal objections and shall draft the conclusions of the hearing committee pursuant to paragraph (g). The administrative officer shall have the authority to rule on objections to questions posed by either party or the committee members. The administrative officer shall not be entitled to vote.

(f) Conduct of hearing. The evidence in support of the charges shall be presented by an attorney. The licensee shall have the rights required to be stated in the notice of hearing (subparagraph (c) of this subdivision). The committee shall not be bound by the rules of evidence, but its conclusion shall be based on a preponderance of the evidence. A hearing which has been initiated shall not be discontinued because of the death or incapacity to serve of one

member of the hearing committee. In the event of a member's death or incapacity to serve on the committee, a member shall be appointed immediately by the chairman of the board. The member shall affirm in writing that he has read and considered evidence and transcripts of the prior proceedings.

(g) Results of hearing. Within thirty days of the conclusion of the hearing the committee shall make (1) findings of fact, (2) conclusions concerning the charges sustained or dismissed, (3) and in the event any of the charges have been sustained a recommendation of the penalty or sanction to be imposed. For the committee to make a conclusion sustaining a charge, two members of the committee must vote for such a determination. The licensee shall be given a copy of the findings, conclusions and recommendations.

(h) Disposition of results. The transcript of the hearing together with exhibits, if any, and the findings, conclusions, and recommendation of the committee shall then be transmitted to the commissioner. The licensee shall be given a copy of the findings, conclusions and recommendation.

(i) Commissioner, recommendation. Within thirty days after the matter is submitted to him, the commissioner shall consider the transcript, exhibits and other evidence, if any, the findings, conclusions and recommendation of the committee and shall make his recommendation as to the committee's findings, conclusions and recommendation. Within five days of the making of his recommendation the commissioner shall transfer the entire record of the proceeding to the board of regents for final decison and order. The licensee shall be given a copy of the commissioner's recommendation.

[j, k, and l deal with time limitations, subpoena power, and review of patient records, respectively.]

(m) Expedited procedures.

[i through iii deal with minor violations.]

(iv) Convictions of crimes or administrative violations. In cases of professional misconduct based solely upon a violation of subdivision five of section sixty-five hundred nine of the education law or based solely upon a finding of a violation of a state or federal statute or regulation pursuant to a final decision or determination of an agency having the power to conduct the proceeding and after an adjudicatory proceeding has been conducted, in which no appeal is pending, or after resolution of the proceeding by stipulation or agreement, and where the violation resulting in the final decision or determination would constitute professional misconduct pursuant to section sixty-five hundred nine of the education law, the commissioner may direct charges be prepared and served and may refer the matter directly to a regents review committee for its review and report of findings, determinations as to guilt, and recommendations as to the measure of discipline to be imposed. In such cases the notice of hearing shall state that the licensee may file a written answer, brief and affidavits with the regents review committee; that the licensee may appear personally before the regents review committee, may be represented by counsel and may present evidence or sworn testimony in his behalf, and the notice may contain such other information as may be considered appropriate by the department. The department may also present evidence or sworn testimony at the hearing. A stenographic record of the hearing shall be made. Such evidence or sworn testimony offered at the meeting of the regents review committee shall be limited to evidence and testimony relating to the nature and severity of the penalty to be imposed upon the licensee. The presiding officer at the meeting of the regents review committee may, in his or her discretion, reasonably limit the number of witnesses whose testimony will be received and the length of time any witness will be permitted to testify. In lieu of referring the matter to the board of regents, the regents reveiw committee may refer any such matter for further action pursuant to paragraph (a) of this subdivision.

[n deals with engagement.]

[11 deals with reporting.]

12. Summary action. Whenever the commissioner, after investigation and recommendation by a committee on professional conduct of the state board for professional medical conduct, is of the opinion that a physician is causing, engaging in or maintaining a condition or activity which in the commissioner's opinion constitutes an imminent danger to the health of the people, and that it therefore appears to be prejudicial to the interests of the people to delay action until an opportunity for a hearing can be provided in accordance with the prehearing and hearing provisions of this section, the commissioner may order the physician, by written notice, to discontinue such dangerous condition or activity or take certain action immediately and for a period of ninety days from the date of service of the order. Within ten days from the date of service of the said order, the state board for professional medical conduct shall commence and regularly schedule such hearing proceedings as required by this section of the public health law which schedule shall include an average of one day of hearing per week, provided, however, that at least five days of hearing shall be held within forty days of the date of service of the order. To the extent that the issue of imminent danger can be proven without the attorney representing the office of professional medical conduct putting in its entire case, the committee of the board shall first determine whether by a preponderance of the evidence the physician is causing, engaging in or maintaining a condition or activity which constitutes an imminent danger to the health of the people. The attorney representing the office of professional medical conduct shall have the burden of going forward and proving by a preponderance of the evidence that the physician's condition, activity or practice constitutes an imminent danger to the health of the people. The physician shall have an opportunity to be heard and to present proof. When both the office and the physician have completed their cases with respect to the question of imminent danger, the committee shall promptly make a recommendation to the commissioner on the issue of

imminent danger and whether the summary order should be left in effect, modified or vacated, and continue the hearing on all the remaining charges, if any, in accordance with paragraph (f) of subdivision ten of this section. Within ten days of the committee's recommendation, the commissioner shall determine whether or not to adopt the committee's recommendations, in whole or in part, and shall leave in effect, modify or vacate his summary order. The state board for professional medical conduct shall make every reasonable effort to avoid any delay in completing and determining such proceedings. If, at the conclusion of the hearing, (a) the hearing committee of the board finds the physician guilty of some of the charges which are the basis for the summary order, (b) the hearing committee recommends that the summary order continue, and (c) the ninety day term of the order has not expired, the summary order shall remain in full force and effect until a final decision by the board of regents has been rendered. If the ninety day term of the order has expired at the conclusion of the hearing and (a) the hearing committee of the board finds the physician guilty of some of the charges which are the basis for the summary order, (b) the hearing committee recommends that a summary order be issued, and (c) an average of one day of hearing has been held each week, provided, however, that five days of hearing have been held within forty days of the date of service of the order, the commissioner may issue a summary order which shall remain in full force and effect until a final decision by the board of regents has been rendered. Any delay caused by the physician in completing the hearing shall cause the order to be continued until the hearing committee makes its recommendation to the commissioner or as otherwise extended herein. For the purpose of determining if hearing days have been regularly scheduled or held, any scheduled day on which a physician represents that he cannot appear, on which the physician fails to appear, or the conduct of which is enjoined by court order, shall be counted as a hearing day.

13. Temporary or permanent surrender. The license and registration of a physician who may be temporarily or permanently incapacitated for the active practice of medicine and whose alleged

incapacity has not resulted in harm to a patient, may be voluntarily surrendered to the board for professional medical conduct, which may accept and hold such license during the period of such alleged incapacity or the board for professional medical conduct may accept the surrender of such license after agreement to conditions to be met prior to the restoration of the license. The board shall give prompt written notification to the division of professional licensing services of the state education department, and to each hospital at which the physician has privileges, of such surrender. The physician whose license is so surrendered shall notify all patients and all persons who request medical services that the physician has temporarily or permanently withdrawn from the practice of medicine. The licensure status of such physician shall be "inactive" and the physician shall not be authorized to practice medicine. The temporary or permanent surrender shall not be deemed to be an admission of disability or of professional misconduct, and shall not be used as evidence of a violation of subdivisions three or four of section sixty-five hundred nine of the education law, unless the physician practices while the license is "inactive"; and any such practice shall constitute a violation of subdivision eight of said section. The surrender of a license under this subdivision shall not bar any disciplinary action except action based solely upon the provisions of subdivisions three or four of section sixty-five hundred nine of the education law and where no harm to a patient has resulted; and shall not bar any civil or criminal action or proceeding which might be brought without regard to such surrender. A surrendered license shall be restored upon a showing to the satisfaction of the commissioner of health, upon the recommendation of a committee of professional conduct of the state board for professional medical conduct, that the licensee is not incapacitated for the active practice of medicine provided, however, that the committee may recommend and the commissioner may, by order, impose reasonable conditions on the licensee, if he determines that due to the nature and extent of the licensee's former incapacity such conditions are necessary to protect the health of the people. Prompt written notification of such restoration shall be given to the division of professional licensing services of the state

education department and to all hospitals which were notified of the surrender of the license.

[14, 15, and 16 deal with reports, certain funding, and liability of certain experts, respectively.]

17. Monitoring. (a) A licensee may be ordered to have his practice monitored by another physician after investigation and review pursuant to paragraph (a) of subdivision ten of this section, if there is reason to believe that the licensee is unable to practice medicine with reasonable skill and safety to patients.

(b) The director of the office of professional medical conduct shall direct counsel to prepare a notice detailing the reasonable cause and a copy of the notice shall be served on the licensee. The matter shall be presented to a committee on professional conduct by an attorney for the office of professional medical conduct and the licensee shall have the opportunity to be heard by such commitee and may be represented by counsel. A stenographic record of the proceeding shall be made. Service of the notice shall be in accordance with the methods of service authorized by paragraph (d) of subdivision ten of this section.

(c) If the committee determines that reasonable cause exists as specified in paragraph (a) of this subdivision and that there is insufficient evidence for the matter to constitute misconduct as defined in section sixty-five hundred nine of the education law, the committee may issue an order directing that the licensee's practice of medicine be monitored for a period specified in the order, which shall in no event exceed one year, by a physician approved by the director, which may include members of county medical societies or district osteopathic societies designated by the commissioner. Upon the request of the licensee, the commissioner or his designee, shall review the hearing record and issue a final order or remand the matter to the committee for further proceedings. The order of the committee shall not be stayed pending an appeal to the commissioner. The commissioner's disposition of the matter shall

be administratively final. The physician responsible for monitoring the licensee shall submit regular reports to the director. If the licensee refuses to cooperate with the physician responsible for monitoring or if the monitoring physician submits a report that the licensee is not practicing medicine with reasonable skill and safety to his patients, the committee may refer the matter to the director for further proceedings pursuant to subdivision ten of this section. An order pursuant to this paragraph shall be kept confidential and shall not be subject to discovery or subpoena, unless the physician refuses to comply with the order.

(d) A licensee may not seek the appointment of a monitor pursuant to this subdivision in lieu of an order issued pursuant to subdivision seven of this section or a disciplinary proceeding pursuant to subdivision ten or twelve of this section.

(18) The commissioner shall have the authority to monitor physicians, physician's assistants and specialists' assistants who have been placed on probation pursuant to a determination of professional misconduct by the board of regents. During such period of probation, the director, or his or her designeee, as provided in the order of the board of regents, (a) may review the professional performance of the licensee by randomly slecting office records, patient records and hospital charts, (b) may require quarterly visits by the licensee to a member of the state board for professional medical conduct or an employee of the office of professional medical conduct, (c) may appoint another physician to monitor the licensee's practice, (d) may require an audit of the licensee's billings for services rendered during probation, (e) may require the licensee to submit on a random basis to tests for the presence of alcohol or drugs, (f) may require the licensee to obtain additional training prior to completion of the probation, (g) may require the licensee to work in a supervised setting, and (h) may impose such additional requirements as may be specified by the board of regents pursuant to regulation. The director is authorized to delegate some or all of the foregoing responsibilities to designated

county medical societies and district osteopathic societies pursuant to the commissioner's direction.

[19 deals with violation of probationary terms.]

III. SELECTIONS FROM RECORD BELOW

Comments submitted to Commissioner of Health via Supervising Administrative Law Judge, prepared by Robert Asher, attorney for petitioner.
(Included in record below, App, pp 188-192)

[App, p 189] It is a matter of fundamental fairness and due process of law that the Findings of Fact be based upon a fair reading of the charges and that a penalty imposing a loss of property (a license to practice medicine), be in some measure proportional to the underlying offense. . . .

We make no objection to the Conclusion of the Hearing Committee that Dr. Hening was convicted of a crime and therefore of professional misconduct pursuant to the Education Law. We agree in general with the Committee's summary of the evidence. We note that, as indicated by the Committee, Dr. Hening was charged with an act completely independent of his medical practice. We also note that OPMC did not charge nor produce evidence to suggest that this act was typical of Dr. Hening's actions or reflected on his character or any ongoing personality problem which might indicate that Dr. Hening was practicing medicine under a disability.

[App, p 190] We believe that the Committee's conclusion that Dr. Hening [*sic*] medical practice presents a substantial danger to the public is contrary to the evidence received by the Committee and that its recommendation of a five year probationary period with interim evaluations and continuous therapy is inappropriate since there was no evidence indicating that Dr. Hening was disabled or impaired in any way which would affect his practice of Medicine. Since OPMC did not charge Dr. Hening with practicing under a disability, the Committee cannot do by indirection what OPMC could not do by direction.

The penalty recommended by the Committtee which includes psychological and/or psychiatric treatment and evaluations is not

related to the charges which concern an isolated misdemeanor based upon conduct which occurred almost six years ago. It is an axiom of due process and fundamental fairness that Respondent be served with those charges that are made against him and be given an opportunity to defend himself. Respondent was only charged with being convicted of a crime and therefore, presented evidence in mitigation of that act. If Respondent had been charged with being impaired, we would have had the opportunity to present evidence and testimony with respect to that charge and would have done so.

The Hearing Committee in making recommendations which obviously refer to Respondent's psyche went far beyond the scope of the charges and the mandate of the Hearing Committee. If Respondent cannot rely on the Statement of Charges served upon him as establishing the parameters of the jurisdiction of the Hearing Committee, than [*sic*] fundamental principles of fairness and due process of law have been compromised and Respondent has not been fairly judged.

Affidavit of Robert Asher, Petitioner's Attorney in Administrative Proceedings, made on July 24, 1986.
(Included in record below, App, pp 193-196)

[App, p 194] I also represented Dr. Hening at a hearing of a Regents Review Panel, which was held on October 8, 1985. Before the hearing, I submitted to the panel three letters from medical faculty members which protested the severity and length of Dr. Hening's penalty and two letters from psychiatrists who had examined Dr. Hening and felt that he posed no danger to any patients he might treat and did not require any period of supervision. I also submitted the curriculum vitae of one of these psychiatrists, who is an internation expert in sexual disorders. At this hearing, I argued that the penalty charged was excessive. I pointed out that the five years of probation required was extraordinarily long and would extend his supervision to twelve years after the incident underlying his guilty plea. In my experience of over ten years involvement with

disciplinary proceedings, the customary penalty for such conviction (which did not involve Dr. Hening's practice of medicine in any way) has been one of several months of probation and stayed suspension, perhaps with an associated fine.

I further argued before the Regents Review panel that the requirement that he undergo psychiatric evaluation and therapy was both unwarranted and violated Dr. Hening's constitutional rights. I argued that it was unwarranted, because there was no evidence that he posed any danger to patients or had any persisting tendency to commit similar antisocial acts. I pointed out that his constitutional due process rights were violated, because he had never been informed that he was required to prove he did not pose a danger to patients and was free of psychiatric impairment. It was [App, p 195] beyond the authority of the hearing panel to raise an issue which had not been charged by the Office of Professional Medical Conduct. Morevoer, requiring therapy without any demonstrated need and requiring such frequent and numerous evaluations was clearly excessive, arbitrary, and irrational. I told the panel that it reminded me of the Soviet practice of imposing psychiatric sanctions on social dissidents, a practice we strongly condemn in our free society. I also argued that, if a psychiatric evaluation were to be required, it would be only reasonable to make any probation and therapy depend upon the outcome of the evaluation. I argued that, if Dr. Hening were found not to be a danger, that his probation and stayed suspension should then come to an end.

Letter of Dr. Fred S. Berlin, M.D., Ph.D., Co-Director, the Johns Hopkins Hospital Sexual Disorders Clinic, dated August 22, 1985.
[Included in the record below, App, p 179.]

I am writing to you subsequent to my evaluation today of Dr. Wayne Hening. As you are aware, I have seen him on a number of prior occasions, and I am quite familiar with his background.

After seeing him today, I once again have come to the conclusion that I see no evidence whatsoever that there is a likelihood he will again act in a sexually inappropriate manner. I continue to believe that his is basically a responsible and mature individual who, given the consequence of that act, is highly motivated and unlikely to behave in a similar fashion again. Given that fact, I do not feel that any purpose is served by continuing to have him on probation, particularly if that probationary status interferes with his ability to pursue his profession in an active and full-time fashion.

Letter of Dr. Lloyd M. Siegel, M.D., dated September 19, 1985.

[Included in record below, App, p 187.]

I have seen Dr. Wayne Hening for Psychiatric evaluation on two occasions: October 4, 1984 and September 6, 1985. I have also sent Dr. Hening for extensive psychological testing and have evaluated the results of those tests.

Based on my knowledge of Dr. Hening's history, situation and present psychological status, I believe that the five year probationary period imposed on him represents an overly severe penalty with potentially very damaging effects, both professional and psychological.

I can unequivocally state that Dr. Hening has not been, is not, and will not be a threat to any patient he might treat.

Order of the Commissioner of Education of the State of New York on behalf of the Board of Regents and State Department of Education, dated April 2, 1986.
[Included in record below, App, pp 35-39.]

[App, p 37] TERMS OF PROBATION

...

3. That respondent shall submit, at respondent's expense, to an examination and any necessary treatment by a psychiatrist, approved by the New York State Education Department, and respondent shall, once every six months during the first two years of the probationary period and once a year during the remaining three years of the probationary period, submit a report from said psychiatrist to the New York State Education Department, addressed to the Executive Director, Office of Professional Disciple, as aforesaid, in which said psychiatrist shall state whether or not respondent is fit to practice as a physician in the State of New York. If any information is received by the New York State Eduction Department indicating that respondent is unfit to practice his profession, such information shall be processed to the Board of Regents for its determination in a violation of probation proceeding initiated by the New York State Education Department;

Excerpts from Probationary Evaluator's Report, Prepared by Dr. Lloyd Siegel on January 5, 1988 for the Office of Professional Discipline

[Submitted as part of the Motion for Leave to Appeal to the New York Court of Appeals, page 30.]

Dr. Wayne Hening was seen by me for psychiatric evaluation on Dec. 1, 1987. I first saw Dr. Hening in Oct., 1984 to assess his psychiatric status.

On this visit, Dr. Hening once again presents a normal mental status, no signs or symptoms of emotional or mental illness and continues to improve in the vocational sphere.

As I have seen Dr. Hening on a regular basis for psychiatric evaluation since Oct. 1984, I have good reason to believe that his situation is completely stable. I do not expect any new findings or symptoms relating to the incident that occurred approximately eight years ago will now develop.

In light of these continued, unchanged and steadily positive psychiatric evalutions extending over the past three years, I would recommend that Dr. Hening's probationary period be terminated.

Excepts from Verified Petition prepared under Article 78 and presented to the New York Supreme Court, Appellate Division, Third Department
[Included in record below, App, pp 201-215]

[App, p 211] 30. The probation imposed by the Board of Regents and ordered by Commissioner Ambach is a significant impairment of Petitioner's liberty and property interests in the use of his medical license and in his career as a Neurologist and medical researcher. In addition, it [App, p 212] directly derives Petitioner of property by requiring seven evaluations at Petitioner's expense.

31. The implicit finding of the Board of Regents, that petitioner is unfit or psychiatrically impaired, manifest in the penalty imposed and now made a part of public record, is a significant impairment of Petitioner's liberty and property interests in his personal and professional reputation.

32. Since Petitioner was never charged with being unfit or impaired, the penalty imposed on him deprived him of protected liberty and property interests without Due Process of Law, in contravention of both the Federal and State Constitutions. Petitioner was denied Notice and a Hearing on the issue of whether he was unfit or impaired. In addition, because of these denials, he was unable to properly present testimony and other evidence on his own behalf and unable to cross-examine adverse parties.

...

[App, p 214] Relief Requested.

WHEREFORE, Petitioner respectfully requests that this Court issue a judment pursuant to Article 78 of the Civil Practice Law and Rules:

(A) Annulling and setting aside Respondent Ambach's order of April 2, 1986 imposing a punishment and penalty on petitioner as

being in violation of Due Process of Law, as guaranteed by the federal and New York State Constitutions, and . . .

(B) Declaring that Respondents had no grounds upon which to find that, at any time, Petitioner suffered from a psychiatric impairment that would render him unfit to practice medicine, and

(C) Modifying the terms of probation imposed on petitioner by Respondents to remove any requirement for psychiatric evaluation or any possibility of required psychiatric therapy under those terms, and . . .

Selections from Petitioner's Brief Submitted In Support of His Article 78 Petition to the New York Supreme Court, Appellate Division, Third Department

[The brief was also submitted as part of the record to the Court of Appeals.]

[PB, page 13]

PETITIONER'S SUSPENSION AND PROBATION WERE BASED UPON A DENIAL OF DUE PROCESS IN THAT HE NEVER RECEIVED NOTICE THAT HE WAS ACCUSED OF BEING PSYCHOLOGICALLY IMPAIRED AND, THEREFORE, COULD NOT PRESENT A DEFENSE AT AN APPROPRIATE HEARING.

Because Petitioner was never formally charged with being psychologically impaired, but penalized because of his impairment, he was deprived of his property, liberty, and reputational interests without Due Process of Law.

A. PETITIONER HAD A PROPERTY AND LIBERTY INTEREST IN THE UNENCUMBERED USE OF HIS MEDICAL LICENSE WHICH HAS BEEN IMPAIRED BY THE PENALTY IMPOSED BY THE BOARD OF REGENTS.

It has long been recognized that state restriction of professional practice implicates both Federal and New York State constitutionally protected property and liberty interests. Dent v. West Virginia, 129 U.S. 114, 121, 9 S.Ct. 231, 32 L.Ed. 623 (1889); Greene v. McElroy, 360 U.S. 474, 492, 79 S.Ct. 1400, 1411 (1959); Matter of Jacobs, 98 N.Y. 98, 105-107 (1885); Hecht v. Monaghan, 307 N.Y. 461, 467-468 (1954). The Commissioner of Education, acting under directions of the Board of Regents, by suspending Petitioner's license, then staying such suspension, and imposing a five year term of probation, (Appendix, pages 34-36) has impaired petitioner's use of his medical license. In addition, the petitioner is required to, as a minimum, pay for seven psychiatric evaluations and reports, one of which has already been prepared and

for which petitioner has paid (Appendix, page 198). This **[PB, page 14]** constitutes a direct loss of petitioner's funds as a consequence of the penalty imposed and, therefore, is a taking of his property.

B. PETITIONER HAD A CONSTITUTIONALLY BASED INTEREST IN HIS PROFESSIONAL REPUTATION WHICH HAS BEEN IMPAIRED BY THE FINDINGS AND PENALTY OF THE BOARD OF REGENTS

The Board of Regents, in accepting the findings of the Hearing Panel (Appendix, page 34), put its imprimatur on the conclusion that petitioner was psychologically impaired. The Hearing panel stated:

> "Respondent's crime raises serious questions as to his emotional capabilities and weaknesses. This could present a critical danger to the public in allowing him to continue to practice medicine." (Appendix, page 26).

This statement of the hearing panel, now a matter of public record, clearly damages petitioner's reputation as a capable, sound and trustworthy physician. In seeking foreign state licensing, employment, hospital privileges, insurance coverage, or enrollment in group medical plans, petitioner will be required to divulge this penalty and it may become the basis for denying him licenses, employment, privileges, coverage, or enrollment or the basis for restricting those which are offered. The long period of probation imposed, which is distinctly unusual (See Section IV), may be taken as evidence of a serious deficiency as a physician.

Where reputation is damaged in the context of other interests, such as Petitioner's constitutionally protected interest in his professional career, then it too is a constitutionally protected interest. As the Supreme Court stated in Board of Regents of State **[PB, page 15]** Colleges v. Roth, 408 US 564, 573, 92 S.CT. 2701, 2707, 33 L.Ed.2d 548 (1972) (citations omitted):

> "[w]here a person's good name, reputation, honor, or integrity are at stake because of what the government is doing to him notice and an opportunity to be heard are essential."

Accord, Owen v. City of Independence, 445 U.S. 622, 633 n. 13, 100 S.Ct. 1398, 1406 n. 13, 63 L.Ed.2d 673 (1980)(discharged employee entitled to a hearing in which he could clear his name); Marrero v. City of Hialeah, 625 F.2d 499, 516 (CA5 1980)(prosecutor's remarks to press damaged business and personal reputation and impaired liberty interests protected by fourteenth amendment); Cohen v. Department of Mental Hygiene, 48 A.D.2d 697, 368 N.Y.S.2d 50 (2d Dept, 1975) (probationary employee who could be discharged even absent cause entitled to hearing on charge of physical abuse which was grounds for dismissal).

C. DUE PROCESS REQUIRED NOTICE AND A HEARING BEFORE PETITIONER COULD BE DEPRIVED OF HIS PROPERTY AND LIBERTY INTEREST IN HIS MEDICAL LICENSE AND HIS PROFESSIONAL REPUTATION IMPAIRED.

Before loss of his property, liberty, and reputational interests, Petitioner was entitled to due process. "The essential elements of due process ... are notice and an opportunity to respond." Cleveland Board of Educatin v. Loudermill, __ U.S. __, 105 S.Ct. 1487, 1495, __ L.Ed.2d __ (1985). "Notice and opportunity to be heard are indispensable to a fair trial whether the case be criminal or civil." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 178, 71 S.Ct. 624, 652 (1951)(citations omitted). Accord, Chalfy v. Turoff, 804 F.2d 20, 22 (CA2 NY 1986). Without suitable notice, a person cannot adequately **[PB, page 16]** defend his interest or controvert an incorrect accusation. As the New York Court of Appeals held in Fitzgerald v. Libous, 44 N.Y. 660, 405 N.Y.S.2d 32, 376 N.E.2d 193 (1978):

> "The notice must sufficiently apprise the party of the charges against him so as to enable him to adequately prepare and present a defense."

Therefore, a fair hearing depends upon suitable notice. It is a core element of notice that it alert the person charged to those findings which the state will seek to prove as the basis for the penalty it will exact. "[t]he party whose rights are being determined must be fully

apprised of the claims of the opposing party and of the evidence to be considered ..." Hecht v. Monaghan, 307 N.Y. 461, 470 (1954). Furthermore, the notice must come at a time when it permits a fair hearing and a proper defense. In the case of In Re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968), the Supreme Court found that an additional charge, added at the conclusion of an administrative hearing, but before final determination, did not provide such meaningful notice and the penalty imposed could not be based on that charge. Accord, Jaffee & Company v. Securities and Exchange Commission, 446 F.2d 387 (CA2 NY 1971) (determination could not be upheld if based on a theory of liability not charged).

D. PETITIONER WAS NEVER GIVEN APPROPRIATE NOTICE THAT THE STATE SOUGHT TO SHOW HE WAS PSYCHOLOGICALLY IMPAIRED AND, THEREFORE, WAS NOT ALERTED TO THE NEED TO SHOW THAT HE WAS NOT PSYCHOLOGICALLY IMPAIRED.

In so far as the penalty of the Board of Regents depends upon a finding that Petitioner was impaired, he was denied notice that he was **[PB, page 17]** charged with impairment and not given an opportunity to make a meaningful defense.

1. Notice that the state sought to prove petitioner had been convicted of a crime which was based on a single event five years earlier could not substitute for notice that the state sought to prove psychological impairment at the present time.

The charges against the petitioner specified professional misconduct solely on the basis of conviction of a crime (Education Law 6509(5a)(i)) (Appendix, pages 14-15). This conviction was based upon a guilty plea, the admission of a single act, which had occurred in 1979, 5 years before petitioner's hearing (Appendix, pages 4-5, 141). Evidence of commission of a single act is clearly inadequate to establish a pattern of behavior or psychological impairment. Cf. Carruthers v. Allen, 19 A.D.2d 572, 239 N.Y.S.2d 756 (3rd Dept. 1963)(even evidence of 10 instances of drug taking do not establish drug addiction). (See Section II for

further discussion of the evidentiary requirement for a finding of impairment.) Moreover, the state was free to charge the petitioner with practicing while impaired, under Education Law 6509(3), but did not do so. This, alone, would indicate that the state did not seek to find the petitioner to be impaired, or was not prepared to attempt to so prove.

2. Because of the lack of appropriate notice, petitioner was denied the opportunity to provide a meaningful defense.

Not only did the state not indicate that it sought to establish that petitioner was impaired, but it presented no evidence which might alert him to that desire. Although the OPMC originally introduced an expert witness (Appendix, page 57), it subsequently elected to proceed without such expert testimony and rested on the basis of court documents **[PB, page 18]** establishing petitioner's conviction (Appendix, pages 76). Because of the state's decision not to produce such evidence, petitioner did not himself present expert testimony before the hearing panel (Appendix, pages 146-147). Because OPMC waived an opening statement (Appendix, page 43), the first indication that OPMC sought to find Petitioner impaired was in its summation. It, therefore, improperly used its summation as an indirect means for bringing a charge of impairment. The OPMC claimed that Petitioner might have, ". . . a continuing problem which could be a danger to his patients" (Appendix, page 156). This reasoning, founded on no evidence, was then improperly adopted by the Hearing Panel (Appendix, page 27). As petitioner argued to the Commissioner of Education, this introduction of an implicit charge by OPMC in summation attempted to "do by indirection what OPMC could not do by direction." (Appendix, page 190). As in In Re Ruffalo, supra, this procedure effectively added a charge after Petitioner was no longer situated to defend against it.

Moreover, it is clear that petitioner could have presented a suitable defense to this charge if given appropriate notice. After the findings and penalty of the hearing panel were known to him, Petitioner presented to the Regents' Review Panel the opinions of two psychiatrists, both competent in psychosexual matters and one

an internationally recognized expert in such matters, both of whom concluded that petitioner was not impaired and posed no danger to patients (Appendix, pages 179-187).

In summary, because petitioner was never appropriately notified that the state sought to prove he was psychologically impaired, he was deprived of the opportunity to present an adequate defense, and, in as much as his penalty depends on a finding of impairment, it was unconstitutionally imposed.

. . .

[PB, page 20]

A. SUBSTANTIAL EVIDENCE OF PSYCHOLOGICAL IMPAIRMENT MUST BE BASED UPON A FULL EXAMINATION OF PERSONALTY AND CHARACTER INCLUDING AN APPRROPIATE PSYCHOLOGICAL EVALUATION PERFORMED BY A SUITABLY QUALIFIED PROFESSIONAL.

A finding of psychological impairment and prospective danger to the community must rest upon suitable professional evaluation. In Ford v. Strickland, __ U.S. __, 106 S.Ct. 2595, __ L.Ed.2d __ (1986), the Supreme Court reviewed the requirements before the state can decide when a convict, condemned to death, is insane. The Court struck down as violative of Due Process a Florida procedure which did not allow the receipt of psychiatric evidence from both sides, cross-examination, and judicial review of the executive department's decision. No Justice argued that such a finding could be supported without suitable psychiatric evidence. A criminal conviction itself is not an adequate evidentiary basis. In Vitek v. Jones, 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980), the Supreme Court found that a criminal conviction cannot, without more, be the basis for a confinement predicated on psychological aberration. A prisoner suspected of psychiatric impairment must be accorded notice and a hearing before being transferred from prison to a psychiatric facility for imposed treatment. The Court also pointed out that psychiatric hospitalization

imposes an additional stigma which impairs the prisoner's liberty interest. A similar imposition is Petitioner's penalty of seven evaluations. In general, criminal trials and administrative hearings aim at establishing different kinds of findings. In discussing civil commitment, the Supreme Court pointed out in Addington v. Texas, 441 U.S. 418, 429, 99 S.Ct. 1804, 1811, 60 L.Ed.2d 323 (1980) that: **[PB, page 21]**

> "The initial inquiry in a civil commitment proceeding is very different from the central issue in either a delinquency proceeding or a criminal prosecution. In the latter cases the basic issue is a straightforward factual question--did the accused commit the act alleged? There may be factual issues to resolve in a commitment proceeding, but the factual aspects represent only the beginning of the inquiry. Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists." (emphasis in original)

Therefore, a criminal conviction depends upon a finding with respect to a designated act; a finding of psychological deviance requires demonstration of a tendency or pattern of behavior which requires professional evaluation.

Excerpts from Jurisdictional Statement filed as required by Court of Appeals Rule 500.2 in conjunction with Petitioner's Appeal On Constitutional Grounds to the New York Court of Appeals

[Page numbers from Jurisdictional Statement.]

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Appellant's Constitutional claims are also significant if he can show that he was arguably subject to deprivation of an interest in liberty and property protected under either the state or Federal constitutions and that there should be an associated requirement of Due Process before that interest was extinguished and, further, that the claims he raises have not been previously settled by the Court of Appeals against him. Appellant identifies three main interests of which he was deprived: first, the interest in being free of imposed psychiatric evaluation and, potentially, therapy required by his disciplinary penalty; second, the interest in pursuing his professional career free of a disciplinary penalty, including suspension (though stayed) and **[Page 4]** probation, which depends upon a finding that he was psychologically impaired and posed a danger to the public; and third, an interest in his personal and professional reputation which was impaired by the summary of the Hearing Panel of the State Office of Professional Medical Conduct and by the requirements and duration of his penalty. Similar interests have all been previously held to be grounded in the state and federal constitutions themselves, even independent of any entitlement created by state law, and to require, at a minimum, notice that the state tends to prove an underlying condition or charge and a hearing on the issue with procedural safeguards appropriate to the deprivation sought (imposed therapy, Vitek v. Jones, 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980); Rivers v. Katz, 67 N.Y.2d 485, 504 N.Y.S.2d 74 (1986); professional discipline, In Re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968); Murray v Murphy, 24 N.Y.2d 1150, 299 N.Y.S.2d 175 (1969); stigma to reputation in association with disciplinary action, Owen v. City of Independence, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), Matter of Petix v. Connelie, 47 N.Y.2d 457, 418

N.Y.S.2d 385, 391 N.E.2d 1360). In his brief, appellant argued that he was deprived of these protected interests without appropriate notice and hearing. In addition, he argued that due process requires the state to prove the underlying charge or condition by some minimum quantum of evidence. While appellant merely argued that the state must provide substantial evidence, in many similar contexts, and even within the professional discipline area itself (Cerminaro v. Board of Regents, __ A.D.2d __ , 508 N.Y.S.2d 693 (3rd Dept., 1986), a higher standard must apply. Indeed, the clear and convincing evidence standard has been applied in analagous circumstances (Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1980): civil commitment as mentally ill and dangerous requires clear and convincing evidence of impaired psychological state). . . .

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In his appeal, appellant would seek to raise the following questions:

1. Is it a violation of constitutionally mandated Due Process for a professional to be subjected to discipline including repeated psychiatric evaluations and to sustain damage to his reputation because of an associated stigma of dangerousness without notice and a hearing on the issue of his possible psychiatric impairment?

2. Is it a violation of constitutionally mandated Due Process for a professional convicted of a single act of misconduct unrelated to his professional activities to be subjected to discipline including repeated psychiatric evaluations over a five year period without the state providing substantial evidence, including competent professional opinion, that he might pose a danger to the public?

Excerpts from Jurisdictional Comments submitted to the New York Court of Appeals during Petitioner's Appeal as of Right, as required by sua sponte examination of jurisdiction under Rule 500.3

[There were no page numbers in this document.]

Significance

To show the significance of a Due Process claim flowing from the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 6 of the New York State constitution, it is necessary to show, first, that I was in possession of a protected liberty or property interest, and second, that I was deprived of an essential element of Due Process when the state acted to deprive me of that interest. In my brief below, I argued that I had been deprived of four interests:

1) a liberty interest to be free from imposed, unwanted, and irrational psychiatric evaluations and therapy (Appellant's brief, hereinafter, PB* , pages 13, 25, 26),

2) a property interest in not being required to pay for required evaluations and possible therapy (PB, page 13-14),

3) a liberty interest in being free of the stigma of imputed psychiatric impairment and dangerousness and in not suffering the related loss of professional and personal reputation in connection with professional discipline procedures that impaired my state entitlement to use of my medical license (PB, page 14-15), and

4) a liberty and property interest in my medical career which would be impaired by the penalty imposed and related stigma (PB, pages 13 through 15).

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* . In the Jurisdicitional comments submitted by petitioner, this was inconsistently noted as AB or PB. Here, I have noted it as PB to conform to the abbreviation used above.

These interests arise from the Constitution of the state and United States, rather than being established as entitlements in state law, although the third does require showing of a related state created entitlement. . . .

I claimed, therefore, that the New York procedures for professional discipline, while conforming to Constitutional requirements in general, were unconstitutional as applied to my case. The crux of my claim was that, to deprive me of these interests, the state was required to show that I was psychologically impaired and posed a danger to the public. It was not enough to show that I had once been convicted of a crime. That showing, like the commitment of the patients in Rivers, supra and the incarceration in Vitek, supra, could not be extended to form a basis for depriving me of these rights. Instead, the state had to make some additional and specific showing that I was psychologically impaired and posed a danger to the public. Similar Constitutional limits have been made in the course of criminal sentencing under mentally disordered offender acts: first a crime was proven, then dangerousness had to be proven separately (As held in Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209 (1967); Hollis v. Smith, 571 F.2d 685 (CA2 NY 1978); People v. Bailey, 21 N.Y.2d 588, 289 N.Y.S.2d 943, 237 N.E.2d 205 (1968)). As I understand these findings, they are based on the understanding that the state and federal Constitutions require that a particular deprivation must be narrowly tailored, even in the absence of statutory limits, to the particular showing (mental illness, commission of a crime) made by the state. They suggest a particular sensitivity to deprivations which implicate psychological infirmity or dangerousness without a very specific showing of the need for such deprivations.

I next argued that in order to make a finding that I was psychologically impaired or dangerous, the state had to provide me with certain procedural protections as guaranteed by the state and federal Due Process clauses. The protections that I stressed were appropriate and timely notice that the state sought to find me impaired and dangerous, a suitable hearing on this issue where I

could present evidence, and a requirement for evidence, meeting at a minimum a standard of substantial evidence and including pertinent professional opinion, to support a finding that I was psychologically impaired (PB, pages 15-24). I argued that I was denied all of these protections. . . .In Vitek, the Supreme Court found that legal incarceration did not justify transfer to a separate psychiatric facility for treatment. Instead, the inmate was to be accorded notice of the proposed transfer, a hearing on the issue, and suitable evidence that he was mentally ill and required such transfer and therapy. Either procedure would have amply satisfied my claim or, in the alternative, a hearing before the medical disciplinary board on the issue of my psychological impairment or dangerousness with the usual procedures would have sufficed. I believe that noone disputes the fact that I was not granted the latter.